

STATE OF MICHIGAN
DEPARTMENT OF INSURANCE AND FINANCIAL SERVICES
Before the Director of Insurance and Financial Services

Tony Smith,
Petitioner,

v

Department of Insurance and Financial Services,
Respondent.

Case No. 14-938-L
Docket No. 14-000707-DIFS

Issued and entered
this 2nd day of May 2014
by Randall S. Gregg
Special Deputy Director

FINAL DECISION

I. BACKGROUND

This case concerns the application of Tony Smith (Petitioner) for a resident insurance producer license.

In August 2013, the Petitioner applied for a resident insurance producer license. On November 22, 2013, the Department of Insurance and Financial Services (Respondent) issued to the Petitioner a Notice of License Denial and Opportunity for Hearing. The denial was based on the Petitioner's disclosure of a 2011 misdemeanor conviction in Kalamazoo County. Petitioner challenged the license denial by filing a Petition for Contested Case Hearing. Respondent filed a motion for summary decision. A hearing on Respondent's motion was held on March 3, 2014.

The administrative law judge issued a Proposal for Decision (PFD) on March 17, 2014, granting the Respondent's motion and recommending that the license denial be upheld. The Petitioner did not file exceptions to the PFD. Michigan courts have long recognized that the failure to file exceptions constitutes a waiver of any objections not raised. *Attorney General v Public Service Comm*, 136 Mich App 52 (1984). The PFD is attached and made a part of this Final Decision.

II. FINDINGS OF FACT

The Director finds that on July 13, 2011, the Petitioner was convicted in Kalamazoo County of misdemeanor theft. The Petitioner negotiated a check intended for his employer and kept the money for his own personal use.

The findings of fact in the PFD, with the exception of paragraphs 6 and 7, are adopted and made a part of this final decision. For the reason stated in the Conclusions of Law, findings of fact 6 and 7 are not adopted.

III. CONCLUSIONS OF LAW

The PFD concludes that the Petitioner's conduct constituted a violation of Section 1239(1)(d) of the Code, MCL 500.1239(1)(d). Section 1239(1)(d) of the Code provides:

(1) In addition to any other powers under this act, the [Director] may place on probation, suspend, or revoke an insurance producer's license or may levy a civil fine under section 1244 or any combination of actions, and the commissioner shall refuse to issue a license under section 1205 or 1206a, for any 1 or more of the following causes:

* * *

(d) Improperly withholding, misappropriating, or converting any money or property received in the course of doing insurance business.

However, Section 1239(1)(d) was not cited by Respondent when the license denial was issued. The license denial was based on a Section 1239(1)(h) of the Code, MCL 500.1239(1)(h), which provides:

(1) In addition to any other powers under this act, the [Director] may place on probation, suspend, or revoke an insurance producer's license or may levy a civil fine under section 1244 or any combination of actions, and the commissioner shall refuse to issue a license under section 1205 or 1206a, for any 1 or more of the following causes:

* * *

(h) Using fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility in the conduct of business in this state or elsewhere.

Section 1239(1)(d) was referenced only in the PFD and was not relied upon by the Respondent in denying the Petitioner's license application or in Respondent's Motion for Summary Decision. Reliance on Section 1239(1)(d) is also problematic because it is not clear from the documents admitted as evidence in this case that the Petitioner was actually engaged in the business of insurance when he misused the funds intended for his employer. The records only reveal that his employer at the time was an entity named "Top Flight Financial." The administrative law judge reasons that, because financial services are regulated by the Director of Insurance and Financial Services, the Petitioner was "doing insurance business" as that term is used in Section 1239(1)(d). In the absence of any description of the nature of the business Top

Flight Financial conducted or the intended use of the funds the Petitioner misappropriated, the administrative law judge's reasoning is too broad an application of subsection (d).

The Director does not adopt the PFD's conclusion of law that the Petitioner violated Section 1239(1)(d).

The Director finds that the Petitioner's misdemeanor conviction establishes a violation of Section 1239(1)(h). The conduct which resulted in the Petitioner's criminal conviction establishes that he engaged in dishonest practices and demonstrated untrustworthiness in the conduct of business.

The Petitioner has not demonstrated that he meets the criteria for licensure and, for that reason, was properly denied a Michigan resident insurance producer license under Section 1239(1)(h) of the Code, MCL 500.1239(1)(h).

IV. ORDER

The refusal to issue an insurance producer license to Tony Smith is upheld.

Annette E. Flood
Director

For the Director:

A handwritten signature in black ink, appearing to read 'R. S. Gregg', is written over a horizontal line.

Randall S. Gregg
Special Deputy Director

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

IN THE MATTER OF:

Docket No. 14-000707-DIFS

Tony Smith,
Petitioner

Agency No. 14-938-L

v

Agency: Department of Insurance
And Financial Services

Department of Insurance and
Financial Services,
Respondent

Case Type: DIFS-Insurance

Filing Type: License Denial

Issued and entered
this 17th of March 2014
by Lauren G. Van Steel
Administrative Law Judge

PROPOSAL FOR DECISION TO GRANT
RESPONDENT'S MOTION FOR SUMMARY DECISION

PROCEDURAL HISTORY

This proceeding under the Michigan Insurance Code of 1956, being 1956 PA 218, as amended, MCL 500.100 *et seq.* (hereafter "Insurance Code"), commenced with the issuance of a Notice of Hearing dated January 16, 2014, scheduling a contested case hearing concerning a Notice of License Denial issued by the Department of Insurance and Financial Services, Respondent, on November 22, 2013, regarding an application for a resident insurance producer license submitted by Tony Smith, Petitioner.

The Notice of Hearing was issued pursuant to a Request for Hearing received by the Michigan Administrative Hearing System on January 14, 2014, and an Order Referring Petition for Hearing and Order to Respond, dated January 10, 2014, issued by Teri L. Morante, Chief Deputy Director. Also contained in the record is the Applicant's Petition for Contested Case Hearing to Appeal Agency Denial of Application for Insurance Producer License, dated December 11, 2013, and an Agency Response to Applicant's Appeal of License Denial, dated January 14, 2014. The Notice of Hearing scheduled a hearing date of March 3, 2014.

On February 11, 2014, Scott D. Basel, Attorney representative for Respondent, filed a Motion for Summary Decision and Brief in Support, along with a Motion to Convert Hearing to Hearing on Respondent's Motion for Summary Decision. On February 19, 2014, the undersigned issued an Order Converting Contested Case Hearing Date to Motion Hearing.

On March 3, 2014, the motion hearing was held as scheduled. Petitioner appeared on his own behalf. Mr. Basel appeared on behalf of Respondent. Respondent offered the following exhibits, which were admitted into the record as evidence:

1. Individual Licensee Application, dated August 15, 2013.
2. Internet Criminal History Access Tool (ICHAT) Michigan State Police printout for Tony Smith (DOB 5/8/1965), dated August 19, 2013.
3. Judgment of Sentence, 9th Judicial Circuit Court, dated July 13, 2011.

Petitioner did not offer any exhibits into evidence. At the conclusion of the parties' oral argument, the undersigned took the Respondent's Motion for Summary Decision under advisement.

ISSUES AND APPLICABLE LAW

The issue presented is whether Petitioner meets the requirements for licensure as a resident insurance producer in the state of Michigan under the Insurance Code, *supra*. Sections 1205(1)(b) and 1239(1)(d) of the Insurance Code provide in pertinent part:

Sec. 1205. (1) A person applying for a resident insurance producer license shall file with the commissioner the uniform application required by the commissioner and shall declare under penalty of refusal, suspension, or revocation of the license that the statements made in the application are true, correct, and complete to the best of the individual's knowledge and belief. An application for a resident insurer producer license shall not be approved unless the commissioner finds that the individual meets all of the following: * * *

(b) Has not committed any act listed in section 1239(1). MCL 500.1205(1)(b). (Emphasis supplied).

Sec. 1239. (1) In addition to any other powers under this act, the commissioner may place on probation, suspend, or revoke an insurance producer's license or may levy a civil fine under section 1244 or any combination of actions, and the commissioner shall refuse to issue a license under section 1205 or 1206a, for any 1 or more of the following causes: * * *

(d) Improperly withholding, misappropriating, or converting any money or property received in the course of doing insurance business. MCL 500.1239(1)(d).

FINDINGS OF FACT

Based on the record as a whole, including the pleadings and admitted exhibits, the following findings of fact are found to be established:

1. On August 15, 2013, Tony Smith, Petitioner, submitted an application for a resident insurance producer license in the state of Michigan. [Resp. Exh. 1].
2. Petitioner responded "yes" on the license application to the question asking, "Have you ever been convicted of a crime, had a judgment withheld or deferred, or are you currently charged with committing a crime?" [Resp. Exh. 1].
3. On September 1, 2010, Petitioner was charged with felony embezzlement-agent or trustee \$1,000.00 or more but less than \$20,000.00. [Resp. Exh. 2].
4. On July 11, 2011, in resolution of the felony charge of embezzlement, Petitioner pled guilty in the 9th Judicial Circuit Court-Kalamazoo County to the crime of misdemeanor embezzlement-agent or trustee \$200.00 or more but less than \$1,000.00 under MCL 750.174(3)(a). [Resp. Exh. 2].
5. On July 13, 2011, the court sentenced Petitioner to jail for one day (with one-day credit) and ordered him to pay costs and fees totaling \$1,008.00. [Resp. Exh. 2].
6. Petitioner's conviction for misdemeanor embezzlement likely arose from his employment as a manager at Top Flight Financial, which is likely a business under the jurisdiction and regulation of the Department of Insurance and Financial Services and thus may be viewed as within the general meaning of the term, "doing insurance business" as set forth in Section 1239(1)(d) of the Insurance Code.
7. The crime of misdemeanor embezzlement likely includes the same type of conduct contemplated by Section 1239(1)(d), being the "improper withholding, misappropriating, or converting of any money or property received in the course of doing insurance business".
8. The crime of misdemeanor embezzlement of \$200.00 or more but less than \$1,000.00 is specifically defined in Michigan law as follows:

Sec. 174. (1) A person who as the agent, servant, or employee of another person, governmental entity within this state, or other legal entity or who as the trustee, bailee, or custodian of the property of another person, governmental entity within this state, or other legal entity fraudulently disposes of or converts to his or her own use, or takes or secretes with the intent to convert to his or her own use

without the consent of his or her principal, any money or other personal property of his or her principal that has come to the person's possession or that is under his or her charge or control by virtue of his or her being an agent, servant, employee, trustee, bailee, or custodian, is guilty of embezzlement. MCL 750.174(1). (Emphasis supplied).

9. On November 22, 2013, Jean M. Boven, Director, Office of Insurance Licensing & Market Conduct issued a Notice of License Denial and Opportunity for Hearing. [Resp. Exh. 3].
10. On or about December 11, 2013, Petitioner filed an appeal of the Notice of License Denial and requested a contested case hearing.

CONCLUSIONS OF LAW

Respondent has now moved for summary decision under Rule 11(c), which provides as follows:

Rule 11. A party may move for a summary decision in the party's favor upon any one of the following grounds: * * *

(c) There is no genuine issue as to any material fact and the moving party is therefore entitled to a decision in that party's favor as a matter of law. 1983 AACRS, R 500.2111(c).

This procedural rule has been recognized in case law as a valid means of resolution for administrative proceedings before the Commissioner (now Department Director). *American Community Mut. Ins. Co. v Commissioner of Insurance*, 195 Mich App 351; 491 NW2d 597 (1992).

Respondent contends that Petitioner's appeal of the Notice of License Denial should be dismissed as there is no genuine issue as to any material fact and the moving party is therefore entitled to a decision in its favor as a matter of law. Respondent has shown the facts set forth above in the findings of fact to be more probable than not. Petitioner, as the nonmoving party to the motion for summary decision, has not produced an affidavit or other documentary evidence to establish that there is any genuine issue of material fact. *Star Steel Supply Co v United States Fidelity & Guaranty Co.*, 186 Mich App 475, 480; 465 NW2d 17 (1990); *American Community Mut. Ins. Co. v Commissioner of Insurance*, *supra* at 363. See also, MCR 2.116(G)(4).

Even viewing the facts in the light most favorable to the non-moving party, denial of licensure is likely required under Sections 1205(1)(b) of the Code, as there appears no genuine issue of material fact that Petitioner has committed an act listed in Section 1239(1)(d) of the Insurance Code, *supra*. Therefore, it is concluded that Respondent is entitled to summary decision in its favor, for dismissal of Petitioner's appeal.

PROPOSED DECISION

The undersigned recommends that the Department Director issue a Final Order, which adopts the above findings of fact and conclusions of law, grants Respondent's motion for summary decision, and affirms the Notice of License Denial.

EXCEPTIONS

Any Exceptions to this Proposal for Decision should be filed in writing with the Department of Insurance and Financial Services, Division of Insurance, Attention: Dawn Kobus, P.O. Box 30220, Lansing, Michigan 48909, within twenty (20) days of the issuance of this Proposal for Decision. An opposing party may file a response within ten (10) days after Exceptions are filed.



Lauren G. Van Steel
Administrative Law Judge